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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/519,314	12/23/2004	Marcus Guzmann	102792-390(1105104)	9126
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PARFOMAK, ANDREW N. NORRIS MCLAUGHLIN & MARCUS PA 875 THIRD AVE, 8TH FLOOR NEW YORK, NY 10022			EXAMINER DOUYON, LORNA M	
			ART UNIT	PAPER NUMBER
			1796	
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			03/01/2010	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/519,314	<b>Applicant(s)</b> GUZMANN ET AL.	
	<b>Examiner</b> Lorna M. Douyon	<b>Art Unit</b> 1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 13 November 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8, 10-15 and 19-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-15 and 19-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/13/09</u> .  | 6) <input type="checkbox"/> Other: _____                          |

1. This action is responsive to the amendment filed on November 13, 2009.
2. Claims 1-8, 10-15, 19-42 are pending.
3. Claims 1-2, 8, 10-15, 19-23, 26, 28-32 and 34 stand rejected under 35 00000U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Foley et al. (WO 00/63342), hereinafter "Foley" for the reasons set forth in the previous office action.
4. Claims 35, 36, 37 and 38 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Foley as applied to the above claims for the reasons set forth in the previous office action.
5. Claims 1-8, 10-15, 19-22, 29-32, 34-42 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Broeckx (WO 00/47707) for the reasons set forth in the previous office action.
6. Claim 33 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Broeckx as applied to the above claims, and further in view of Fonsny (US 4,846,992) for the reasons set forth in the previous office action.

7. Claims 1, 3-8, 10-15, 19-32, 34-36, 39-42 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Corring et al. (US Patent No. 5,141,664), hereinafter "Corring" for the reasons set forth in the previous office action.

8. Claim 33 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Foley or Corring as applied to the above claims, and further in view of Fonsny (US 4,846,992) for the reasons set forth in the previous office action.

### ***Response to Arguments***

9. Applicants' arguments filed November 13, 2009 have been fully considered but they are not persuasive.

With respect to the anticipation rejection based upon Foley, Applicants argue that Foley does not *necessarily* teach all of the limitations of the presently claimed invention and argues that simply because two components of a composition have different colors does not *necessarily* mean that these colors will interact to produce a third color.

The Examiner respectfully disagrees with the above argument because Foley teaches all the material limitations of the present claims, including the required proportions. As stated in the previous office action, Foley teaches a liquid dishwashing detergent product in Example A, Sample E which comprises 16.0 wt% sodium tripolyphosphate, 16.0 wt% potassium tripolyphosphate (a total of 32 wt% salt), 1.0 wt% hydroxide, 0.04 wt% nonionic surfactant, 1.5 wt% nonionic surfactant, 1.0 wt%

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polyacrylate polymer thickener, 0.0005 wt% dye solution, 0.7 wt% solid prill and balance water (63.7595 wt%) (see page 15, lines 16-34). The composition above minus the water is 36.2405 wt% nonaqueous, therefore, by calculation, the total amount of salt in the nonaqueous component is 88%, [i.e.,  $(32/36.2405) \times 100 = 88\%$ ], which meets the required "nonaqueous component comprising a salt content of at least 70% salt"). The solid prills have a diameter of about 750  $\mu\text{m}$  and are formed from a sucrose core coated with a polymeric coating formed from methyl cellulose (the encapsulating agent, which also read on the density aid), which is about 5% by weight of the particle, and have a bluish-green color (see page 16, lines 1-9), and said solid prills read on the primary particles of the instant claims. The resultant particles are insoluble in the liquid composition but are soluble in the wash solution during automatic dishwashing (see page 16, lines 10-11). Foley also teaches that by adding enzymes to the composition in the form of enzyme particles, stability of the enzymes in the composition is enhanced (see page 3, lines 6-9), and the particles are formed as disclosed in US Patent No. 4,965,012, which is incorporated by reference (see page 5, lines 28-33). The preferred composition may additionally comprise an enzyme stabilizing system (see page 13, lines 17+). In one embodiment, the particles are colored and the dishwashing liquid detergent composition is clear or translucent, so as to make the liquid dishwashing product aesthetically pleasing (see page 5, lines 20). Inasmuch as the composition is clear or translucent (or semi-opaque), the composition should inherently have a transmittance within those recited. In one embodiment, the particles have a dark green color whereas the liquid composition has a light green color, and other preferred color

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combinations for the polymeric coating on the particles and the liquid dishwashing composition are blue:blue, blue:white; green:green, green:white and green:yellow, respectively (see paragraph 5, lines 20-25). Even though Foley does not explicitly disclose the color of each of the composition and solid prills interacting together to form a third color, it would be inherent for the dyed composition and colored prills to exhibit the same property because same ingredients and proportions have been utilized. The gel density, the difference in the density of the composition and particles, and migration speed of the particles of Foley should inherently be within those recited because same ingredients and proportions have been utilized.

Where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a *prima facie* case of either anticipation or obviousness has been established. *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977) “When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (fed. Cir. 1990). Therefore, the *prima facie* can be rebutted by evidence showing that the prior art products do not necessarily possess the characteristics of the claimed product. *In re Best*, 562 F.2d at 1255, 195 USPQ at 433. See also *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed Cir. 1985). See MPEP 2112.01 I.

In addition, “products of identical composition can not have mutually exclusive properties.” A chemical composition and its properties are inseparable. Therefore, if the

prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (fed. Cir. 1990). See MPEP 2112.01 II.

With respect to the obviousness rejection of claims 35-38 based upon Foley, Applicants argue that Foley fails to teach or suggest anything about the components of the detergent composition having a first color and a second color such that the radiation transmitted by the gel having a first color interacts with the radiation from the second color of the primary particles to produce a third color.

The above response to Foley applies here as well.

With respect to the obviousness rejection of claims 1-8, 10-15, 19-22, 29-32, 34-42 based upon Broeckx (WO 00/47707), and the obviousness rejection of claim 33 over Broeckx in view of Fonsny, Applicants argue that the Examiner rightfully acknowledges that Broeckx fails to teach (1) the claimed water content of the claimed invention; (2) a non-aqueous component comprising a salt content greater than 70%; and (3) the interaction of the radiation emitted by the gel and colored particles and solids forming a third color, the transmittance of the composition and migration speed of the particles in the gelled composition. Applicants also argue that while the Examiner contends that it would have been obvious to modify Broeckx in order to achieve the presently claimed invention, the applicants submit that a person of ordinary skill in the art would have had to make too many modifications to the prior art.

The Examiner respectfully disagrees with the above argument because, as stated in the previous office action, Broeckx teaches that liquid laundry compositions, in

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concentrated form, have a water content of preferably less than 40%, more preferably less than 30% (see page 11, lines 17-22). Broeckx also teaches: a heavy duty gel laundry detergent composition which comprises, by weight of the composition: (a) from about 15% to about 40% of an anionic surfactant; and (b) one or more of ingredients like deterative amine, suitable electrolytes; and may further contain one or more additional deterative additives like non-citrate builders, polymeric dispersing agents (see page 28, lines 14-30), dyes, colorants and mixtures thereof (see page 29, lines 1-2), enzymes and enzyme stabilizing agents (see page 8, lines 28-30), the composition having a viscosity at  $20\text{ s}^{-1}$  shear rate of from about 100 cp to about 4,000 cp (see page 29, lines 3-5), and is clear or translucent, i.e. not opaque (see page 29, line 20). Suitable dispersing agent (which reads on thickening agent) includes polycarboxylates derived from acrylic acid (see page 94, lines 1-14). The gel laundry detergent composition also comprises from 0 to about 10% electrolyte (see page 29, lines 21-27). The compositions will typically comprise at least about 1% builder, preferably from about 10% to about 80% (see page 90, lines 8-13), for example, alkali metal salts of polyphosphates and sulphates (see page 90, lines 21-26), which are salts.

Even though Broeckx does not specifically disclose a water content of from about 20 to 65% by weight, 20-50% or 35-50% by weight, or a non-aqueous component comprising a salt content of at least 70%, as stated in the previous office action, it would have been obvious to one of ordinary skill in the art at the time the invention was made to optimize the proportions of water and builder through routine experimentation for best results. As to optimization results, a patent will not be granted based upon the



optimization of result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the *prima facie* case of obviousness. See *In re Boesch*, 617 F.2d 272,276,205 USPQ 215,219 (CCPA 1980). See also *In re Woodruff* 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F2d 454,456,105 USPQ 233,235 (CCPA 1955).

Even though Broeckx does not explicitly disclose the interaction of the radiation emitted by the gel and colored particles and solids forming a third or fourth color, the transmittance of the composition and migration speed of the particles/solids in the gelled composition, as stated in the previous office action, it would have been nonetheless obvious to one of ordinary skill in the art at the time the invention was made to reasonably expect the gelled composition of Broeckx to exhibit similar, if not the same, characteristics as those recited because similar ingredients have been utilized.

With respect to the rejection of claims 1, 3-8, 10-15, 19-32, 34-36, and 39-42 over Corring and claim 33 over Corring in view of Fonsny, Applicants argue that there is no reason why a skilled artisan would have modified Corring, and any suggestion to do so is clearly based on an impermissible hindsight reconstruction of the presently claimed invention.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon

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hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As stated in the previous office action, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated dyes into the clear gel, as well as to the encapsulated particles and the alumina or silica because this would provide a pleasing aesthetic characteristic on the final product. Even assuming that the prior art's resulting composition has only one color, please note that the present claim's final color, after all the colors of the gel, primary particles and secondary particles interacted together also forms a final color, therefore, the prior colors of the gel, primary particles and secondary particles are not given patentable weight because these are viewed as product-by-process claims. The final color of the resulting composition of the present claims, after the gel, primary particles and secondary particles have interacted when mixed together, is what is visible to the naked eye, regardless of whether or not the starting materials have different colors prior to mixing, because the present claims are product claims, not process of making, such that the prior state of the starting materials is not given patentable weight.

### ***Conclusion***

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to 3 whose telephone number is 571-272-1313. The examiner can normally be reached on Mondays-Fridays 8:00AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lorna M Douyon/  
Primary Examiner, Art Unit 1796

